

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

TYREE DUANE HARRIS, 3:09-CV-01190-ST

Petitioner, ORDER

v.

BRIAN BELLEQUE,

Respondent.

BROWN, Judge.

Magistrate Judge Janice M. Stewart issued Findings and Recommendation (#50) on December 9, 2011, in which she recommends the Court (1) deny Petitioner relief as to his claims predicated on *Blakely v. Washington*, 542 U.S. 296 (2004); (2) decline to deny Petitioner relief on the basis of procedural default as to his claims predicated on *Apprendi v. New Jersey*, 530 U.S. 466

(2000); and (3) allow Respondent to file a brief addressing the merits of Petitioner's *Apprendi* claims within 60 days of the Court's Order. Petitioner and Respondent filed timely Objections to the Findings and Recommendation. The matter is now before this Court pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b).

When any party objects to any portion of the Magistrate Judge's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate Judge's report. 28 U.S.C. § 636(b)(1). See also *Dawson v. Marshall*, 561 F.3d 930, 932 (9th Cir. 2009); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (*en banc*).

In his Objections Respondent reiterates the arguments contained in his Response to Petitioner's First Amended Petition for Writ of Habeas Corpus. This Court has carefully considered Respondent's Objections and concludes they do not provide a basis to modify the Findings and Recommendation. The Court also has reviewed the portions of the record pertinent to Respondent's Objections *de novo* and does not find any error in the Magistrate Judge's Findings and Recommendation.

Similarly, in his Objections Petitioner mainly reiterates the arguments contained in his First Amended Petition for Writ of Habeas Corpus and his Reply. The Court has reviewed the portions of the record pertinent to Petitioner's Objections *de novo* and

does not find any error in the Magistrate Judge's Findings and Recommendation. This Court also has carefully considered Petitioner's Objections in light of his reiterated arguments and concludes they do not provide a basis to modify the Findings and Recommendation. The Court notes Petitioner asserts for the first time in his Response to Respondent's Objections that, even if Petitioner's *Apprendi* claim is procedurally defaulted, the Court may consider that claim because Petitioner can show cause for the procedural default and "prejudice attributable thereto." *Murray v. Carrier*, 477 U.S. 478, 484 (1986). Because the Court adopts the Findings and Recommendation based on the record before the Magistrate Judge, the Court need not address any of Petitioner's newly asserted secondary argument related to procedural default of his *Apprendi* claims.

Accordingly, the Court denies Petitioner relief as to his claims predicated on *Blakely* but declines to deny Petitioner relief on the basis of procedural default as to his claims predicated on *Apprendi*.

CONCLUSION

The Court **ADOPTS** Magistrate Judge Stewart's Findings and Recommendation (#50). Accordingly, the Court **DENIES** Petitioner relief as to his claims predicated on *Blakely*, **DECLINES to deny** Petitioner relief on the basis of procedural default as to his

claims predicated on *Apprendi*, and **DIRECTS** Respondent to file a brief addressing the merits of Petitioner's *Apprendi* claims not later than **June 4, 2012**. Issued related to *Apprendi* will be taken under advisement by the Magistrate Judge on **June 19, 2012**.

IT IS SO ORDERED.

DATED this 3rd day of April, 2012.


ANNA J. BROWN
United States District Judge